April 21, 2021

Jennifer Jones Austin, Chair
Margaret Egan, Executive Director
New York City Board of Correction
1 Centre Street
New York, NY 10007
Via Email: maegan@boc.nyc.gov; bennettstein@boc.nyc.gov; boc@boc.nyc.gov

RE: Board of Correction's Proposed Rule on Restrictive Housing

Dear Chair Jennifer Jones-Austin, Executive Director Margaret Egan and Members of the Board:

Each year, thousands of New Yorkers are subject to isolation and segregation inside our City's jails by the Department of Correction ("DOC" or "the Department"). Brooklyn Defender Services[1] ("BDS") submits these comments on behalf of those who we represent—along with their families, friends, attorneys, and other advocates—who are all directly impacted by the serious trauma caused by DOC's restrictive housing policies and practices. We urge the Board to follow the advice of countless doctors, scholars, corrections experts, and human rights advocates by adopting rules that reject torture and move the City towards abolishing all forms of restrictive housing while also enhancing accountability over the Department.

Over the years, we have written extensively to the Board documenting the detrimental impact isolation has on people, and how the lack of accountability within the Department only exacerbates the harm people face every day while in custody. We recognize the Board's efforts to investigate those individual cases and acknowledge the enormous undertaking now before you as you seek to address the serious deficiencies in the disciplinary and restrictive housing structure inside the City's jails. Unfortunately, as written, the Board's proposed rule fails to end solitary confinement and instead perpetuates the harm under a different name, Risk Management Accountability System ("RMAS"). Despite the City's claims to be banning solitary confinement,

[1] Brooklyn Defender Services provides multi-disciplinary and client-centered, family, and immigration defense, as well as civil legal services, social work support and advocacy in nearly 30,000 cases in Brooklyn every year. As part of our representation, BDS dedicates staff to provide direct services and advocacy for our clients while they are incarcerated in New York City jails in pre-trial detention, serving sentences of less than a year, or returning from New York State Department of Corrections and Community Supervision ("DOCCS") prisons upstate. Our Jail Services division works directly with people incarcerated in New York City jails, advocating for their rights and humane treatment and care, while monitoring systemic jail conditions.

the proposed restrictive housing scheme would allow the Department to confine people to extremely restrictive and isolating conditions up to 24 hours a day indefinitely with no meaningful congregate engagement.

For the Board's rule to come close to ending torture by isolation, the following areas must urgently be addressed:

- All people must have meaningful and congregate programming outside of their cell that is conducive to human interaction;
- The rule must impose strict time limits to ensure no person is held indefinitely in restrictive housing;
- The rule must provide specificity and guidance to ensure the protections of people in custody, while holding DOC accountable;
- People in custody must be afforded the right to obtain representation at all disciplinary hearings and periodic reviews; and
- The Board can no longer rubberstamp the Department's repeated variance request to bypass Minimum Standards, and must set a limit to the use of variances to prevent the continued abuse of this process.

A year after the death of Layleen Polanco, a woman who died in a restrictive housing unit on Rikers Island, the Mayor announced last June for an end to solitary confinement. In response to the Board's Report on the Death of Layleen Xtravaganza Cubilette-Polanco,[2] the Mayor announced a four-person working group to provide recommendations to ensure the end of solitary in NYC. Yet, despite the importance of this issue to the public, these recommendations have remained hidden.[3] Beyond this lack of transparency, the Board's proposed rule on restrictive housing, with recommendations from the Mayor's working group, does not end solitary confinement; instead, the Board's rule incorporates some of the worst practices of extreme isolation and packages them as progress to ending torture. The current proposed rule is solitary confinement by another name.

Out-of-Cell Time Must be Meaningful and Allow for Congregate Human Interaction

The devasting harms of solitary confinement comes not from being in one particular space or another but instead from being alone, without meaningful engagement nor a congregate setting to allow for human interaction. For out-of-cell time to be truly valuable time out of cell, it must allow for congregate interaction with multiple people in the same space, without the barriers of hard metal fencing and plexiglass alone in an individual cage. With this in mind, the structurally restrictive units at NIC should not be considered models for the Board's proposed RMAS Level 1, nor should these units be considered humane alternatives to punitive segregation. Indeed, the reality of the proposed restrictive housing scheme's out-of-cell time is that a person will remain isolated in a cell and an adjacent cage, alone, and can be held indefinitely with no meaningful

[2] https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/BOCReports/2020.06_Polanco/Final_Polanco_Public_Report_1.pdf

[3] In fact, BDS attempted to obtain the recommendations made by this working group through a FOIL request in January of this year, but the Board denied our request as well as our subsequent appeal.

interaction with others. This design violates the entire concept and spirit of meaningful out-of-cell time.

These units have no place in New York City and this Board should not include this design structure in the proposed rule if it is truly committed to ending solitary in NYC jails. Despite the claim that RMAS Level 1—the most restrictive units within DOC custody under the proposed rule—will have at minimum 10 hours out-of-cell, a close read of the proposed rule reveals a different reality. This is a false narrative that the City is ending 23-hour lock-in, given the constraints inherent in the design structure of RMAS Level 1, the proposal only codifies extreme isolation, as the 10 hours of "out-of-cell" time are in a solitary cage no larger than the adjacent cell.

Further, RMAS Level 1 does not allow, nor does this Board require in its proposed rules, congregate programming or any meaningful engagement or interaction with others. As a result, this new system of restrictive housing will only isolate people further, exacerbating the harms this Board promised to end. The rule alludes to the importance of engagement with others by requiring that people shall engage, "both visually and aurally" and "in a setting where people can converse without needing to raise their voices to be heard." Yet, this language gives the Department the leeway to satisfy any out-of-cell time requirements without ever letting the person out of a cage as long as they can "see and hear" others. Thus, not only would this fail to meet any reasonable understanding of a congregate setting or meaningful interaction, but as written, the Board's proposed RMAS Level 1 will also be in violation of recently passed legislation, Humane Alternatives to Long Term ("HALT") Solitary Confinement Act[4], which guarantees congregate programming and activities.

No one can reasonably question the critical role meaningful out-of-cell time plays in preventing decompensation and ensuring the most basic level of mental, physical, and emotional safety for people who are isolated in restrictive housing. Medical professionals, security experts, human rights scholars, and advocates have all stressed that people in isolation must have access to out-of-cell time, and that this time must be meaningful and provide human engagement. Nonetheless, the Department fails time-and-again to provide appropriate and sufficient out-of-cell time for people in its custody. The Board is well-aware of this deficiency,[5] yet ignores this systemic shortcoming by failing to define "meaningful" out of cell time and forgoing necessary safeguards.

What should out of cell time look like? The concept that out-of-cell time should be "meaningful" stems from the "Mandela Rules"[6] promulgated by the United Nations ("UN"). Those rules relied on the concept of "meaningful" human contact to define isolation. The UN recognized that

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[4] New York State Assembly. Humane Alternatives to Long Term Solitary Confinement Law https://assembly.ny.gov/leg/?default_fld=&leg_video=&bn=A02277&term=&Summary=Y&Text=Y

[5] *See, e.g.*, Board of Correction, An Assessment of Enhanced Supervision Housing for Young Adults, July 24, 2017, 25, https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/2017.07.24%20-%20FINAL%20YA%20ESH%20Report%207.24.2017.pdf (finding evidence that young people were not afforded the requisite number of hours out of cell due to lockdowns, security procedures, staff shortages, staff tardiness, and delayed busses, among other reasons)

[6] United Nations General Assembly Resolution 70/175, adopted 17 December 2015, United Nations Standard Minimum Rules for the Treatment of Prisoners, https://undocs.org/A/RES/70/175 ("Mandela Rules")

humans require mental, physical, and emotional contact to survive. The American Bar Association has similarly recognized that all people, including those in segregation, must be provided with "meaningful forms of mental, physical, and social stimulation."[7] Inherent in these concepts is the reality that incidental or obligatory contact is insufficient.

Meaningful congregate out-of-cell programming is essential for combating idleness, yet what the Board is proposing goes against what we know works. In one recent example, a man, referred to as Mr. A, experienced several incarcerations in his life during which he spent years in and out of solitary confinement. He recently reported the immense benefits of congregate programming — Dialectical Behavior Therapy ("DBT") — that he is now receiving:

> *"These emotional skills I'm learning have changed my whole outlook. It's changing the way I interact with other guys and COs too".*

The aspect of this program that Mr. A found most enriching was the meaningful time with other people. He described discussing the material with other individuals and practicing the skills they learned together on days they didn't have formal programming:

> *"I feel like I've formed real connections for the first time in here. I now have other guys who I know would check me - in a positive way!- if I start to get in my head again. [The programming] has really helped me with my mental state, helping me to calm down and remember that everyone is just trying to live their lives... this is the first positive thing to come out of my time here."*

The significant benefits Mr. A received from DBT programming would not be possible in restrictive housing under the proposed rule. Trying to participate in programming, while sitting in a cage separated from staff and other participants by plexiglass and hard metal fencing is simply not meaningful engagement. When asked if the progress Mr. A had made would have been possible if he and other participants were in separate cages, he answered:

> *"Not a chance. The only way this works is by connecting with other people and being able to open up. No one can do that if they're being treated like an animal."*

Despite the fallacies this Board is advancing, the proposed design for RMAS Level 1 and Level 2 prevents people from any meaningful out-of-cell time. Literal barriers of plexiglass and hard metal fencing prevent people from engaging in meaningful stimulation that is critical to counteracting the torture that will come with these proposed RMAS units. Isolated time in a cage away from the cell where a person is normally confined is not a substitute for meaningful engagement or stimulation. We thus urge the Board to define "meaningful" time out of cell in a way that avoids these unacceptable predicaments and ensure that meaningful out-of-cell time is just that: meaningful and outside of a cell.

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[7] American Bar Association, Standards on Treatment of Prisoners, Segregated Housing, Standard 23-3.8(c), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners/

The proposed rule also fails to impose guidelines for ensuring that programming involves actual engagement with others or rules that govern how the Department makes determinations around programming. In particular, the Board should consider the following deficiencies regarding the rule's mandate of "participation" in programming:

- The rule does not indicate how programming will be facilitated within Levels 1 and 2. This absence of such guidelines is particularly concerning as the rule makes no mention of designated program areas for congregate and meaningful interaction, and as a result, people will remained confined to their cell and adjacent cage during program hours;
- The rule states that programming will be five hours combining both in- and out-of-cell activities, without requiring a minimum out-of-cell time during programming hours. This means that, under the rules as written, DOC can offer one minute of out-of-cell programming and four hours and 59 minutes of in-cell programming and still be considered adequate under the proposed rule; and
- The rule makes no mention of what accountability will look like when DOC makes any such arbitrary determination.

Beyond ensuring that the programming offered to people in restrictive housing be substantial and meaningful, participation in such programming should not be a requirement for people to progress out of RMAS housing. Mandated participation does not take into account many factors that could prevent someone's participation, including trauma, concerns over safety, physical abilities, language barriers, undiagnosed mental health needs or undiagnosed intellectual and developmental disabilities. And, as written, without any strict guidelines by the Board, programming can be satisfied by a worksheet that a person has to complete isolated in their cell while DOC determines if that person has adequately "participated" to progress to the next level. Under this ill-defined mandate that leaves too much discretion with the Department, people will languish in these units indefinitely and decompensate as they are isolated without any meaningful interaction. This is dangerous, counterproductive and will not address the purported violence DOC claims as evidence in their push for these units.

Ending solitary isn't just about what the cell looks like, but about creating an environment for pro-social behavior. RMAS Level 1 is extreme isolation and amounts to the continued use of solitary confinement. This Board must provide out-of-cell time, and if it is to be considered true time out of cell, there must be access to meaningful and congregate interactions with at least several people at a time in the same open space that is conducive for healthy human engagement.

Strict Time Limits are Required to Ensure People Do Not Languish in Solitary Confinement

All People in the City Jails Must Have Access to 14 Hours Out-of-Cell Per Day

In order to reduce the extensive harm caused by solitary confinement, the Board should mandate 14 hours out-of-cell for all people in NYC jails. Such a mandate is not only effective, but also

consistent with the Board's current standards[8] and should be required for all people in DOC custody without exception.[9] While separating people may be necessary at times, it should be done in a limited and targeted fashion and, wherever possible, limited to separating people from other specific individuals rather than from any other human contact. And if a person absolutely needs to be separated from all others during informal out-of-cell time, they should still be afforded programming out of cell to promote socialization and permissible conduct. This is certainly possible, as evidenced by programming like the Clinical Alternatives to Punitive Segregation ("CAPS") in NYC jails and the Resolve to Stop the Violence Project ("RSVP") in San Francisco jails, which do not restrict out-of-cell time, but instead focus on meaningful programming and engagement, and have shown to reduce violence and improve safety.

Efforts to promote access to meaningful programming and interaction with others will be fruitless without mandated out-of-cell time. We thus urge the Board to institute a requirement of 14 hours of out-of-cell time across the Department to ensure that people have adequate time and opportunity to meaningfully engage with others and aren't merely confined to isolated units that amount to solitary confinement by another name. While the content of programming or out-of-cell time might be revised or other benefits curtailed, the basic human necessity of leaving a cage and interacting with other people must not be compromised.

Any and All Forms of Restrictive Housing Must Adhere to Strict Time Limits

The Board must impose strict limits on any and all forms of restrictive units to ensure people do not languish in an isolated environment indefinitely. As currently written, and without such strict time limits, the Board's proposed rule would allow for people to be held in RMAS indefinitely. Specifically, despite mandated periodic reviews in RMAS Levels 1 and 2, the proposed rule allows the Department to hold people in restrictive units based on a broad and vague "documented intelligence" that a person would engage in violence if progressed to a less restrictive level. Similarly, individuals in Level 2 or 3 are unable to progress out of RMAS housing unless they complete undefined programming mandates. These imprecise regulations of the Department's use of restrictive housing would therefore allow DOC staff to document discretionary determinations and broad generalizations as a basis for continuing to hold someone in these restrictive units indefinitely. The result is a lack of any real oversight as to how long a person can languish in isolation.

Despite the Board's efforts to highlight the progress it purports to be making through its proposed rule on restrictive housing, the failure to impose strict time limits break from related regulations and legislation that offer more protection to those in DOC custody. The Board's current minimum standards already set a limit to the use of punitive segregation, yet this proposed rule sets us back with broad and vague criteria with unknown end dates at the behest of the Department. Further, unless the rule is changed to provide people with meaningful out-of-cell congregate programming, HALT will prohibit the Department from holding people in RMAS

[8] Board of Correction Minimum Standards, § 1-05 (noting that the no person may be involuntarily locked in a cell in DOC other than eight hours at night and two hours during the day for count).
[9] The current exception allowing the Department to lock people in punitive segregation or Enhanced Supervision Housing ("ESH") units in their cells for more than the otherwise allowed 10 hours each day should be eliminated.

Levels 1 and 2 more than 15 consecutive days when it goes into effect. The Board should act now and impose strict time limits on the use of any and all forms of restrictive housing.

The Rule Must Provide Enough Specificity and Guidance to Protect People in the Jails and Limit the Department's Discretion in its Use of Restrictive Housing

Restrictive Statuses Imposed by the Department Have Detrimental and Long-Term Consequences with Little Oversight

Other than reporting requirements, these rules do not specify how the Department should determine when to use or limit restrictive statuses. Restrictive status or classifications have a significant, harmful impact that undermine any rehabilitative purpose that the Department allegedly seeks to serve. For instance, restrictive classifications allow DOC to deny broad groups of people access to important programs. Yet, despite the severe consequences, the Department imposes these classifications carelessly, identifying people as high security or the subject of unsubstantiated gang allegations, without providing any meaningful opportunity to appeal or other due process protections.

In a recent case, a BDS criminal defense attorney successfully advocated that a man she represented, who had a history of substance use, would serve reduced jail time if he participated in a program for people struggling with addiction. Despite agreement by the parole officer and the District Attorney's Office, the attorney learned from Correctional Health Services that the man was denied entry into the program because of his high security classification, a designation which stemmed from a decade-old incarceration where DOC identified him as gang-affiliated. Although he was not in a gang and was fully committed to participating in the program, he was not able to move forward with the agreement because of a classification from years ago that he had no real opportunity to challenge.

Not only do these classifications render many rehabilitative efforts ineffective, but they actually obstruct the goal of creating a safe and secure environment. These classifications severely limit access to crucial services such as programming, mental health, law library and counsel visits, either because these services are not provided or because there is an excessive wait time for the single escort assigned to the unit. Once someone is given a high classification, problems with access to care and programming are exacerbated. As the Department's classification system result in severe isolation, obstructing People's access to any of the beneficial programs or services, any effort to end the use of solitary confinement must impose real limitations and regulation on its use.

Correctional Health Services Must be Emboldened to Ensure the Safety and Wellness of All People in Custody

The rule fails to address the Department's dangerous tendency to restrict the access that people in restrictive housing have to Correctional Health Services ("CHS"). Indeed, BDS has reported to the Board numerous cases of people in restrictive housing decompensating or not receiving adequate healthcare or support. Such harm has even been endured by those we represent who should have been excluded from restrictive housing due to medical vulnerabilities from day one.

In one egregious case, BDS represented a man who entered a restrictive unit and quickly decompensated. Our office tried on multiple occasions to meet with him only to be told "he refused." In a follow-up attempt, a DOC officer informed us that he wasn't going to make it to his visit because he was "playing in his own feces." We immediately notified the Board and CHS. While we are grateful that he has since been moved out of restrictive housing, he should never have been cleared to enter that restrictive unit in the first place. At the very least, he should have been removed immediately when there were obvious signs of decompensation. It should not have taken our office to flag this case for CHS to act, and we fear what would have happened if we had not been notified.

CHS failed to ensure healthcare was provided to the people who desperately needed it until our office intervened on those people's behalf. The Board's proposed rule does little to address the medical needs of people in restrictive housing whose needs are often ignored, and we fear that, as currently written, the rule will merely embolden the ongoing gatekeeping by the Department.

Therefore, we urge the Board to consider the following in its proposed rule during this rulemaking process:

- The list of people who must be excluded from restrictive housing is dangerously narrow. The exceptions and exclusions in the current draft of the proposed rules should be expanded to ensure that all particularly vulnerable people—people under 26[10] or over 55, people with physical ailments, people who suffer from physical or cognitive impairments, people subject to a heightened risk of self-harm, and others—be excluded from all forms of restrictive housing. The narrow list of exclusions in the current proposed rules is careless at best and constitutes willful blindness at worst. Additionally, the listed exclusion, "people diagnosed with an intellectual disability," should be expanded to include all people with a neurological, intellectual, or developmental disability. Only with these broadened exclusions can the Board ensure that people who are especially vulnerable are not forced into isolation in the jails, the harms of which are exacerbated by the Department's interference with access to CHS.
- The rule states CHS shall determine if a person meets the exclusion criteria but fails to articulate how and what resources CHS should utilize in making these determinations to ensure no one is overlooked. For example, if CHS is making determinations based on their last interaction with an individual, that interaction could have taken place weeks, maybe even months prior to a disciplinary incident. Yet, the passage of even short amounts of time could render these determinations obsolete, as it is not uncommon for people to decompensate, experience trauma, or confront other factors impacting their behavior and mental health during incarceration. In order for CHS to make an accurate assessment for determining potential exclusion, CHS should be required to meet with

[10] One of the reasons that isolation is particularly harmful to young people is that during adolescence, the brain undergoes major structural growth. Particularly important is the still-developing frontal lobe, the region of the brain responsible for cognitive processing such as planning, strategizing, and organizing thoughts or actions. The brain is still developing through age 25, and the harms of isolation, light depravity and lack of meaningful interaction can lead to significant damage.

people in custody in a private, confidential setting away from the housing unit and immediately prior to any placement into RMAS.

- The rule states CHS shall maintain a current list of all individuals with serious medical conditions to share with DOC with the stated purpose that DOC can "confirm signs of life."[11] However, even under the proposed rules, access to services and limited movement in RMAS will be at the behest of correctional staff, making this a dangerously inadequate response to ensure people with serious medical conditions receive appropriate care. DOC has an extensive history of failing to notify CHS and failing to respond to medical crises which have resulted in death, most notably the recent death of Layleen Polanco while in the jail's restrictive housing. These rules not only allow but encourage DOC, rather than medically trained professionals, to be official gatekeepers to healthcare services. Far too many New Yorkers have died in the Department's custody for the Board to ignore the urgent need for oversight and accountability of the Department's treatment of medically vulnerable people in restrictive housing.

BDS has reported numerous cases of people decompensating, cases of people not receiving adequate healthcare or support, and cases where the person should have been excluded from restrictive housing from day one. Despite being authorized to remove any person who meets the exclusion criteria from restrictive housing, CHS has failed to do so for numerous people we represent. In these circumstances, it wasn't until our office intervened did CHS respond to their needs.

The Board has an opportunity to drastically change how we treat people in our City jails, but the proposed rule does not address the already known and documented harms of isolation, nor do they address the fundamental role CHS is authorized to play. We cannot expect change to exist if we choose to repeat the failed practices of CHS and this Department.

Due Process Requires that People Facing Disciplinary Hearings are Afforded the Right to Obtain Representation

We urge the Board to ensure real due process protections for people in the jail by affording them the right to obtain representation at disciplinary hearings. Due process protections are an undeniable necessity in a process that could result in even greater restrictions on a person's liberty than they already endure by being in the jail. Indeed, the Board has made some headway to recognizing the importance of due process protections generally, by requiring some very basic protections such as notice to people in the jail of their hearings and the requirement that refusals to sign a notice of infraction be videotaped. Yet, the limited protections afforded by the Board's proposed rule are entirely inadequate, and do not account for the reality of this disciplinary process that is both severe in its consequences and unequal in its implementation. Instead, the principles underscored in the proposed language that the Legal Aid Society submitted regarding

[11] NYC Board of Correction: Notice of Rulemaking on Restrictive Housing in Correctional Facilities March 5, 2021 § 6-17 Other Conditions; Page 91. Retrieved from https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2021-Restrictive-Housing/2021.03.05-Proposed-Rule.pdf

this rule are critical to achieving a more just process for individuals facing possible extreme isolation within the jail's restrictive housing scheme.

Currently, these adjudicative hearings that can result in traumatic prolonged deprivations of even basic interaction with others are one-sided, leaving people in the jails to face an almost insurmountable presumption of guilt. Members of the Department handle every aspect of the process, from writing up the initial ticket and investigation, to conducting and making a determination at the hearing. These DOC employees have the further benefit of having prior experience with this process, or at least the opportunity to discuss it with others who have. People who are incarcerated have no similar opportunity and are denied any real assistance before or during the hearing regardless of how inequitable the resulting process may be. For example, as to people who do not speak English or are illiterate, blind, or deaf, the proposed rule only provides an impartial hearing facilitator; yet, such a facilitator does not advise or advocate for this person, who is left to confront the Department and make crucial decisions implicating their most basic liberties without any assistance or guidance. And even where an alleged infraction could result in criminal charges, people do not have the assistance of an advocate at the hearing in the jail, despite the severity of the consequences and the constitutional implications.

In one example, a BDS client was charged with an infraction at the jail and was informed by Department employees that if she simply admitted the charges, the punishment would be more lenient. Without anyone to advise her about this administrative process or guide her through the hearing, she deferred to the Department's directive and was relegated to a restrictive housing unit and placed in Enhanced Restraints. Soon after the hearing and the Department's encouragement that she admit all charges, criminal charges based on these very allegations were filed. The resulting criminal proceedings were undoubtedly influenced by the disciplinary hearing—at which she had no advocate to balance against the coercion of the Department employee—at the very least by the fact that trips to the criminal courthouse were made in chains and a spit mask.

In a process where the weight of the Department bears down on an individual accused of an infraction, the only way to ensure a meaningful opportunity to be heard at disciplinary hearings is by affording people a reasonable opportunity to obtain representation. A representative—whether an attorney, social worker, or other advocate—can advise an individual throughout the adjudicative process, including when making important decisions such as whether to make a statement in a case that could result in a criminal prosecution, and help explain evidence and balance strategic considerations. An advocate can also help ensure compliance with the rules already in effect. For example, although the Department is already required to notify people of hearings, we consistently hear that our clients are not provided notice of the hearing or are not brought to the disciplinary hearing despite wanting to attend. Allowing advocates to attend the hearings that are currently exclusively overseen and—excluding the individual accused of an infraction—attended by members of the Department of Correction will help ensure that such failures are no longer tolerated.

Access to representation is not only necessary but also straightforward and attainable. It exists in jails in other jurisdictions[12] as well as in other administrative hearings,[13] and once HALT is implemented, it will exist here. The Board should take this opportunity to ensure access to representation for disciplinary hearings now. We fortunately live in a City with a robust network of Public Defender Offices, each of which is eager to take on the work associated with ensuring that the people in the jails are afforded due process and a meaningful opportunity to be heard. We only ask that you let us in.

The Board Must Limit the Department's Abuse of the Variance Mechanism

As the Board contemplates new rules to reduce the use of restrictive housing as a system of punishment within the City's jails, it must also ensure that the rules it establishes will be enforced. This requires limiting the Department's use of variances, which the Department has consistently exploited to bypass this Board's Minimum Standards.

As one recent example, when the Board required that young adults be excluded from placement in Enhanced Supervision Housing, the Department merely extended their use of this practice for six years through repeated six-month variances, which the Board systematically rubber-stamped. Earlier this year, when the Board finally rejected the Department's request to renew this variance, the Department simply bypassed the Board's decision by improperly issuing daily emergency declarations for two weeks.[14] These repeated daily declarations by the Department were an egregious abuse of the "emergency" mechanism outlined in Minimum Standard § 1-15(b)(3)— which only allows for such declarations for short periods of less than 24 hours—to continue a practice the Department knew to be in contravention of the Minimum Standards for years. Yet, the Board was silent on this abuse of process, and failed to issue a Notice of Violation or otherwise defend its Minimum Standards.

The Board has turned a blind eye to this abusive practice for too long. The Minimum Standards promulgated by the Board exist to protect the physical and mental well-being of those in the City's jails. Acquiescing to the Department's requests to bypass these rules by rubber-stamping variance requests time and again undermines the value of these rules and standards and erodes the public's trust in the process by which they are created. If these new rules are to have any force, the Board cannot continue this misguided practice and must ensure compliance with the Minimum Standards.

Conclusion

This is a significant moment in our City's history to right the wrongs isolation has brought to communities devasted by our criminal legal system. Together, we have an opportunity to not just change policy but also to address the serious systemic and cultural attitudes that lead to

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[12] *Program Manual*, District of Columbia Department of Corrections (Jan. 2, 2019), available at https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/PM%205300.1I%20Inmate%20Disciplinary%20and%20Administrative%20Housing%20Hearing%20Procedures%2001-02-2019.pdf; 103 CMR 430.12(1) (In Massachusetts, "[a]n inmate may be represented by an attorney or a law student in disciplinary proceedings…").

[13] *See, e.g.*, 8 U.S.C. § 1229a(b)(4)(A) (providing for the right of individuals in removal hearings to obtain counsel).

[14] News Items, NYC Board of Correction, available at https://www1.nyc.gov/site/boc/news/2021.page.

widespread violence and dehumanizing treatment of New Yorkers in City custody. We can no longer turn a blind eye—as a community we must hold this City accountable for how it treats people in DOC custody and demand an end to punishment by isolation in our jails. Greater oversight of the Department is a crucial element of efforts to build structures that do not rely on violence but rather provide socialization, individualized treatment, and therapeutic environments to promote safe communities. In line with these principles, we urge the Board to adopt restrictive housing rules that reflect the following standards:

- All people—without exception and regardless of housing placement—should be afforded 14 hours out of cell each day, during which they have access to meaningful out-of-cell congregate programming;
- Strict time limits on all levels of restrictive housing must be established to ensure people do not languish in isolated environment indefinite;
- NIC's structurally restrictive unit should not be accepted as a model for an alternative to punitive segregation;
- A lack of participation during programming hours should not prevent people from progressing out of restrictive housing;
- Vulnerable people in the Department's custody should be excluded from any type of restrictive housing or isolation;
- Trained medical and mental health staff, rather than DOC employees, should be the ultimate deciders of who and when people can access medical and mental health care; and
- People should be allowed to obtain representation for disciplinary hearings and periodic disciplinary placement reviews; and
- The Board must put an end to the Department's use of the variance process as a means to bypass Minimum Standards.

Each day the City fails to end the trauma that results from solitary confinement is another day in which lives are lost and minds are destroyed in New York. The time to act is now.

Thank you for your consideration.

Sincerely,

/s/ Kelsey DeAvila
Kelsey DeAvila
Project Director, Jail Services

/s/ Hanna Perry
Hanna Perry
Staff Attorney, Civil Rights and Law Reform